



FEDERALLY SPEAKING



by Barry J. Lipson

Number 45

Welcome to *Federally Speaking*, an editorial column for ALL interested in the **Federal Scene**, originally compiled for the members of the Western Pennsylvania Chapter of the Federal Bar Association and all FBA members. Its purpose is to keep you abreast of what is happening in the Federal arena, whether it be a landmark US Supreme Court decision, a new Federal regulation or enforcement action, a “heads ups” to Federal CLE opportunities, or other Federal legal and related occurrences of note. Its threefold objective is to educate, to provoke thought, and to entertain. This is the 45th column in this series, and together with prior columns is available on the website of the U.S. District Court for the Western District of Pennsylvania: <http://www.pawd.uscourts.gov/Pages/federallyspeaking.htm> [note revised web address].

LIBERTY’S CORNER

The “Middlizer” - The New Great Equalizer

Sam Colt’s 45 was *the great equalizer* of the *Old West* (“God may have created all men, but it was Sam Colt who made them equal”). By “the 21st century,” however, according to Pat Buchanan, “the **Atom Bomb** is *the great equalizer*.” Or is *the great equalizer* now a more positive force such as the **Internet** which, according to former FCC Chair William E. Kennard, has been called such “because it can reduce economic isolation, and equalize economic opportunity;” or, as proposed by Gerry N. Zaragoza in *The Manila Times*, “**Public Education**” which the Americans introduced into my country “together with *Coca-Cola*, ... with a noble purpose of making education universal,” to wit “*the great equalizer* that ... created a new class: *the middle class*.”

No, *the great equalizer* in twenty-first century America may well be that mighty political force, “*The Great Middlizer*,” the saving grace of our Democracy, our Republic. Not the force that creates the great “*middle class*,” but that seemingly irresistible force that tends to mitigate extremes in the **Presidency** and the **Judiciary**, whether they be Democrat or Republican controlled, and propels those occupying such positions towards the *middle of the road*. Indeed, the extreme right, apparently fearing that the “*Middlizer*” will work, expresses its “serious concern” that **Republican President George W. Bush’s** U.S. Supreme Court appointments may “*pull Earl Warrens*” and swing too far to the left (whether this is a true fear or a clever ploy remains to be seen), while the extreme left is concerned it won’t work. This “centrist force” is acknowledged as a legitimate political philosophy and is defined by *The American Heritage Dictionary* as “Centrism ... the political philosophy of avoiding the extremes of right and left by taking a moderate position” (the sole Google reference to “muddle” equates it to “center”).

The Presidency

In “*Pursuit of ‘The Middle Way’*,” authors Louis Galambos and Daun van Ee explain **Republican President Dwight Eisenhower’s** travels along the middle road: “Eisenhower did not want to roll back history, junking federal policies that in his view had proven successful. As he told his brother Edgar

during an unguarded moment, 'Should any political party attempt to abolish Social Security, unemployment insurance, and eliminate labor laws and farm programs, you would not hear of that party again in our political history.' He was in fact willing to strengthen those federal programs that had good track records and even to introduce new measures on a selective basis. But at the same time, he wanted to prune programs such as those in public power and agricultural subsidies, whose costs he thought far outweighed their benefits to the nation. If successful, he would slow and perhaps even stop the growth of the administrative state. This was his concept of the '*Middle Way*.'

Then too, *Encyclopedia Americana* reports that **Democratic President John Fitzgerald Kennedy** also traveled the "*middle-of-the-road*": "In the campaign against his Republican opponent, **Vice President Richard M. Nixon**, he took positions that, while *middle-of-the-road*, were somewhat more liberal than those held by Nixon, and defended them vigorously in an exhaustive campaign across the nation. ... On the troublesome question of the policies of **Sen. Joseph R. McCarthy**, who was admired by many of Kennedy's constituents, he took *a middle position*. To one McCarthyite he wrote: 'I have always believed that we must be alert to the menace of communism within our country as well as its advances on the international front. In so doing, however, we must be careful we maintain our traditional concern that in punishing the guilty we protect the innocent'."

The Clintons have also demonstrated respect for *the new great equalizer*. According to William Crotty's President's Day Address at Northeastern University, **Democratic President Bill Clinton** "promoted a 'third way,' *a middle ground*, and promised a down-sized, more efficient government;" while Christine Lagorio of CBS News reports that there are "Hillary watchers who believe" **Democratic Presidential hopeful Senator Hillary Rodham Clinton's** "every move is dictated by political ambition view the senator's increasingly *middle-of-the-road* political profile as a White House strategy," and quotes Thomas Mann of The Brookings Institution: "Her Senate actions look to shore up Democratic weaknesses: national security, religion and social issues, while holding to the party mainstream on economic issues." As summed up in the Associated Press report of former **Democratic Vice Presidential candidate Senator Joseph Lieberman's** philosophy: "'You get things done when you work *from the middle out*,' Lieberman said. 'I look forward to playing an active role and getting some things done for the public by working across party lines as I always have'."

Academia also recognizes the political necessity of respecting "*The Great Middlizer*." As recognized by Michael A. Genovese, Chair of Leadership Studies and Director of the Institute for Leadership Studies at Loyola Marymount University: "Most of these marginals tend to be situated *in the middle of the political spectrum*, and that is why, once the nomination is wrapped up, candidates of both parties try to first solidify their bases, then, immediately *move to the middle*. These are the voters for whom debates really matter. These are the voters who can be swayed, won or lost. They are the primary targets of campaigns and the debates."

The Judiciary

But does this also apply to the **Judiciary**, especially U.S. Supreme Court Justices?

In counterbalance to a far right assertion that if Bush "sends a judge up for confirmation that did not have a record of pro life, there would be an unbelievable firestorm in the Republican Party," Associated Press reported that former **Republican House Speaker Newt Gingrich** did not share this view: "Bush must *reach out to the middle* and work with conservative Democrats and moderate Republicans, even if it means angering his conservative base. 'If he spends a lot of his time trying to appease the right at the expense of *reaching out to the middle*, he will destroy his administration'." According to Gingrich, "who led the GOP takeover of the House after 40 years of Democratic rule, ... the biggest mistake he made as speaker was trying to satisfy the most conservative members of his party in the House. 'I was the most conservative speaker in modern times, and I tried to appease the 10 people who were

unappeasable. ... All it did was make them feel more important, more emboldened.' Gingrich said Bush's image as a leader, and his success as president, will be enhanced if he has '10 or 15 people on the right biting at his ankles while he reaches out to the country'. Neither of Bush's two recent Supreme Court appointments "have a record of pro life."

The far right, as noted earlier, fears the new Supreme Court appointments may "*pull Earl Warrens.*" **Republican President Dwight Eisenhower** was disappointed when his conservative Supreme Court appointee **Chief Justice Earl Warren** "proved to be an unabashed liberal." Already sitting on the Court was **Justice Tom Clark**, who **Democratic President Harry Truman** had also appointed as a conservative. However, as reported in the **Wikipedia**, Clark "proved a key vote in some Warren Court cases expanding the scope of individual rights. He is noted for writing the majority opinion in the landmark cases *Mapp v. Ohio*, applying the **Fourth Amendment** 'exclusionary rule' to the States, and *Abington School District v. Schempp*, invalidating daily Bible readings in public schools. Clark supported the end of racial segregation, siding with the majority in *Brown v. Board of Education* and *Sweatt v. Painter*.... He became hated by Truman for his vote to strike down as unconstitutional Truman's seizure of the nation's steel mills to avert a strike in 1952's *Youngstown Sheet & Tube Co. v. Sawyer* after advising Truman as Attorney General that he had legal authority to do so." (Interestingly, **Democratic President Lyndon Johnson** maneuvered Justice Tom Clark off the Supreme Court by appointing his son Ramsey Clark as his Attorney General. Ramsey has gone on to be a "hero" of the far left.) A more recent example is **Republican President George Herbert Walker Bush's** appointment of **Justice David Souter** who began voting with the liberal faction "on the Court within a short time, and even sided against his sponsor's son in *Bush v. Gore* in 2000."

And this is just the tip of the iceberg. According to **Larry J. Sabato, Director of the University of Virginia Center for Politics**, "*about a quarter of confirmed nominees in the last half-century, ends up evolving from conservative to moderate or liberal. These evolutions take many years, sometimes decades, but they are undeniably a part of the Court's history.*" In addition to those noted above, other examples include "**Justices William Brennan, Byron 'Whizzer' White, Harry Blackmun**, and other Justices. Warren, Brennan, and Blackmun moved to the left--the usual direction, given the incentives provided by the news media and historians, while Whizzer White was a remarkable exception, shifting from a **JFK** New Frontiersman to a pro-life social conservative."

Why? Sabato speculates, "lifetime tenure with no retirement age means total independence from effective pressure of any kind. The 'reward system' *on* the Court is very different from the system prevailing in a nomination battle. During the nomination phase, strict adherence to the ideology of your side--at least in appearances--is essential. Once the black robes are donned, the approval of society's elites, including editorial and academic praise, is highly prized by most Justices." Dahlia **Lithwick**, *Slate Magazine* columnist, further theorizes that some Justices, like **David Souter**, "had so little 'real-life' experience prior to his confirmation that he only developed his jurisprudential views after donning the black robe.... Certainly there is some truth to the proposition that justices who either rose through the executive branch (like a **Clarence Thomas**) or had tremendous advocacy experience (like a **Ruth Bader Ginsburg**) are less likely to change their views once confirmed," though, as revealed in *Federally Speaking Nos. 19 and 18*, even **Justice Thomas** has revealed a liberal side (*Insubordinate or Terminally Black ... What other issues will bring out the "Earl Warren" in Justice Thomas?* - citing *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), and *Watchtower Bible and Tract Society Of New York, Inc., v. Village Of Stratton*, 536 U.S. 536 (2002)).

And what of now **U.S Supreme Court Chief Justice John G. Roberts Jr.**? Lithwick believes "Roberts seems to recognize the fundamental role and value of moderation in the law. He respects its glacial pace and tends to understand that his job is to guide, not shape, the law. In short, Roberts may shift toward the middle over time, but he is highly unlikely to become the court's staunchest liberal." Indeed, at his confirmation hearing, Roberts did discuss the "*middle area*": "My observation during our

meeting, Senator, was not an expression of legal determination. And it doesn't necessarily mean a view that Congress' action or involvement would be determinative or would even be within the scope of legal authority, depending on what the issue and the arguments were. I do know that when you are in the *middle area*, where it's difficult to determine whether Congress is supporting the president's action or is opposed to the president's action, that the court often has to try to read the tea leaves of related legislation. If you look at the *Dames and Moore* decision coming out of the Iranian hostage crisis, what the court did in that case, applying *the middle tier*, was look at a vast array of legislation. And it was a very difficult enterprise to try to figure out what Congress' view was. My point was simply that if we'd know what Congress' view was, it might make it easier to apply it in a particular case, and you wouldn't have to go through that process of trying to determine what position Congress was in, if that turned out to be pertinent under the particular legal challenge.”

Another View

Perhaps **Andy Rooney** of CBS News' *60 Minutes* has gotten it right (or left): “We're All Americans ... I don't know whether you think I'm a liberal or a conservative, a Republican or a Democrat. Whatever you think, you're probably wrong. I tend to be more liberal than conservative, but don't count on it. *I'm not middle-of-the-road. I'm all over the road.*” And that's where we are now. The far right is concerned that the new makeup of the Supreme Court will *not* blindly follow their agenda, the far left is afraid *that they will*. Hopefully, we will embrace *the great equalizer* views of **President Kennedy, who from time to time has been praised by all**, to wit, paraphrasing, “we must be alert to the menace of ... [terrorism], within our country as well as its advances on the international front. *In so doing, however, we must be careful we maintain our traditional concern that in punishing the guilty we protect the innocent.*” (Emphasis added throughout.)

Postscript

Neither “Liberal”[7] nor “Conservative”[12] is a four letter word! (We give no credence to the *Craps Rules* that if “on the first roll, you make a 7 ... you've rolled a ‘natural’ and you win,” or that if “you roll a ... 12 on your first throw, that is called ‘craps’ and you lose;” nor that “Craps” is also defined as “unacceptable behavior.”) Looking at the **United States political scene** from abroad, the **Finnish University of Tampere's Department of Translation Studies** observes that in “the U.S. political spectrum, *‘Liberals’* are said to be slightly left-of-center or somewhat left-of-center” and “*‘Political’ Liberals* tend to favor greater federal power to remedy perceived social inequities,” while “*‘Cultural’ Liberals* tend to support a woman's right to choose when to give birth, as well as feminism, homosexual rights, and similar freedoms of personal choice and behavior.” And *Conservatives*? They encompass any “shade of political opinion from moderately right-of-center to firmly right-of-center... *‘Political’ Conservatives* in the United States usually support free-market economic principles and low taxes, and distrust federal, as opposed to state and local, government power. *‘Cultural’ Conservatives* may be opposed to abortion or to the excesses of popular media.” *So now we must also factor in the differences between “Political” and “Cultural” Conservatives/Liberals and how all this “middlizes”.....*

This Column is dedicated to the preservation of the U.S. Constitution & the Bill of Rights.

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